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COMMISSION ON THE STATUS OF WOMEN
Open-ended Working Group on the
Elaboration of a Draft Optional
Protocol to the Convention on the
Elimination of All Forms of
Discrimination against Women
11-22 March 1996

ELABORATION OF A DRAFT OPTIONAL PROTOCOL TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

Draft report of the Open-ended Working Group (Part I)*

Chairperson: Ms. Aloisia WÖRGETTER (Austria)

INTRODUCTION

1. The Open-ended Working Group on the Elaboration of a Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women was convened pursuant to Economic and Social Council resolution 1995/29 of 24 July 1995 to consider a comprehensive report by the Secretary-General, including a synthesis, on the views of Governments, intergovernmental organizations and non-governmental organizations on an optional protocol to the Convention, including views related to feasibility, taking into account the elements suggested by the Committee on the Elimination of Discrimination against Women in its suggestion 7, adopted at its fourteenth session. 1/

2. At the 4th plenary meeting, on 12 March 1996, the Vice-Chairperson of the Commission, Ms. Karin Stoltenberg (Norway) was designated Chairperson of the Working Group. At the 7th plenary meeting, Ms. Aloisia Wörgetter (Austria) was designated Chairperson of the Working Group to replace Ms. Karin Stoltenberg (Norway) who resigned due to unforeseen circumstances.

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* The draft report of the Open-ended Working Group will be issued in two parts under the symbol E/CN.6/1996/WG/L.1 and Add.1.

3. The Working Group met from 11 to 22 March 1996. It held ____ meetings (1 to __). It had before it a report of the Secretary-General on the elaboration of a draft protocol to the Convention on the Elimination of All Forms of Discrimination against Women contained in documents E/CN.6/1996/10 and Corr.1 and Add.1 and 2.

4. The acting-Chairperson opened the meeting and made a statement.

5. The Director of the Division for the Advancement of Women made an introductory statement.

6. At the same meeting, in order to assist in its deliberations, the Working Group was briefed by a member of the Committee on Human Rights on the provisions, procedures and experience of the Committee on Human Rights under the First Optional Protocol to the International Covenant on Civil and Political Rights. He also responded to questions raised by delegations.

7. At the 2nd and 5th meetings, on 12 and 13 March, the Chairperson of the Committee on the Elimination of Discrimination against Women made a statement and responded to questions raised by delegations with regard to specific elements of suggestion 7, as well as with regard to the working methods of the Committee in the examination of States parties' reports.

8. At the 5th meeting, on 13 March, the representative of the Centre for Human Rights responded to questions raised by delegations with regard to the practice and procedures of other United Nations human rights mechanisms.

9. The Working Group, at the invitation of the Chairperson, first held a general exchange of views on the question of an optional protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, followed by a systematic and in-depth exchange of views on aspects that would need to be addressed in such a protocol, using as a basis for discussion the elements proposed by the Committee on the Elimination of Discrimination against Women in suggestion 7.

A. General exchange of views

10. There was strong support in favour of an optional protocol to the Convention and the process initiated for its elaboration. Delegations stated their readiness to cooperate and to participate actively in the Working Group to achieve an effective instrument that would command the greatest possible support and a large number of ratifications.

11. Delegations identified certain difficulties to be overcome in the elaboration of a protocol, raised questions that needed to be clarified in the process, and expressed support for its preparation at this point in time.

12. It was argued that an optional protocol would increase the efficacy of the Convention, and lead to more effective protection and promotion of the human rights of women. Such a procedure would strengthen the Convention and put it on an equal footing with other human rights treaty mechanisms. According to one

delegation, a communications procedure could place undue attention on individual cases, whereas situations of massive violations needed to be addressed.

13. The preparation of an optional protocol was seen to be a key element in the follow-up to the Vienna Conference on Human Rights and the Fourth World Conference on Women. It represented a unique opportunity to fill procedural gaps in existing mechanisms. During its preparation, the reasons for the low number of ratifications of other complaints mechanisms could be assessed with a view to avoiding them in the instrument.

14. Many delegations pointed out that the question of the relationship between the proposed optional protocol and existing mechanisms providing for a communications procedure needed careful consideration. In that regard, overlapping or duplication would have to be avoided; the need for streamlining of the human rights machinery was noted, including the efforts to mainstream women's human rights and a gender perspective into the general human rights regime. It was also emphasized that, while the question of overlapping and duplication presented a challenge, it should not stand in the way of the elaboration of such a procedure. The question of overlapping had also been raised, inter alia, at the time of the drafting of a Convention on the Elimination of All Forms of Discrimination against Women, and its reporting procedure, both of which are now widely accepted.

15. The possible complementary role that a well-drafted protocol could play within the human rights regime was highlighted, especially given the wider scope of the provisions of the Convention. The limitations of other procedures, and their lack of concern for the rights of women were noted. The elements proposed by the Committee on the Elimination of Discrimination against Women and those contained in the Maastricht draft would be useful in the work ahead.

16. Reference was made to procedures under a number of treaty-based and Charter-based human rights mechanisms. It was noted that the different nature of the communications procedure under the Commission on the Status of Women would not overlap with an optional protocol. The view was expressed that an optional protocol should not establish an essentially different approach from the one contained in the First Optional Protocol under the International Covenant on Civil and Political Rights. However, further comparison with the mandates and jurisprudence of existing machinery would help to identify where further work was needed to support the realization of women's rights.

17. The question of the justiciability of rights contained in the Convention on the Elimination of All Forms of Discrimination against Women under an optional protocol on the right to petition was addressed by many delegations. Several delegates pointed to the diverse nature of States parties' obligations under the various provisions of the Convention, and the implications for their justiciability. It was suggested that some provisions would be clearly suited to be the subject of a petition procedure, while other provisions were of a more programmatic nature for which a different procedure might be required. Thus, work on an optional protocol would need to proceed in the light of the various types of provisions contained in the Convention. On the other hand, a number of delegates expressed the view that all substantive provisions of the Convention should be considered justiciable under an optional protocol.

18. Several delegations commended the important work done by the Committee on the Elimination of Discrimination against Women. The need to strengthen the Committee through, inter alia, an increase in resources and meeting time was put forward. Concern was expressed by some delegations that despite the recent extension of meeting time for the Committee, this might not be sufficient to deal both with the existing backlog in report consideration, as well as with the task of considering communications.

19. Some delegates expressed concern with regard to possible financial implications resulting from the adoption of an optional protocol. The costs involved would need to be estimated. One delegate expressed the view that the elaboration of an optional protocol might not be the best use of resources for maximizing the effectiveness of women's enjoyment of their rights. Instead, the achievement of universal ratification and better implementation of the Convention should be pursued, including through better and more timely reporting to the Committee.

B. In-depth consideration of major aspects to be covered by an optional protocol, following the elements contained in Committee suggestion 7

20. The Chairperson invited the Working Group, in addressing the specific elements proposed by the Committee on the Elimination of Discrimination against Women, to take into consideration the cross-cutting themes that had emerged during the general exchange of views, such as the question of overlapping with existing procedures, and the question of justiciability, as applicable. She informed the Working Group of her intention to call also on non-governmental organizations to make their comments on specific elements.

Element 5

21. Delegations considered the element to be acceptable. It was proposed to add the option of signing it, i.e. "... option to sign, ratify or accede to it".

22. The question of the status and impact of reservations entered to provisions of the Convention by States parties with regard to the admissibility of communications under the optional protocol was discussed. Delegations agreed that ratification of the optional protocol would leave substantive reservations to the Convention intact. Some delegations considered such an understanding to be without prejudice to the permissibility of a reservation and its compatibility with the Convention and with international treaty law. While agreeing that reservations were permissible under the Convention, reference was also made to article 28.2 that "a reservation incompatible with the object and purpose of the Convention shall not be permitted". Thus, one delegation could not share the view expressed by many that a reservation to a substantive provision would a priori prevent the Committee from considering a communication. A particular case in point would be reservations of a sweeping nature to which certain States parties have stated their objections. It would be up to the Committee to examine the compatibility of such reservations with the Convention, and, consequently, the admissibility of a communication.

23. With regard to justiciability, it was suggested that this question would be especially relevant with regard to discussions on the type of procedure to be contained in an optional protocol, and its relation to the various provisions of the Convention, including whether the programmatic provisions would be excluded from being justiciable under an individual complaints procedure. The view was expressed that only those provisions of the Convention that established absolute obligations could be justiciable. The type of views the Committee would express at the conclusion of an examination would also be relevant in this regard.

24. Some delegations stated that it should be left to the Committee to determine the question of justiciability on the basis of concrete cases, rather than to exclude a priori certain provisions.

25. One delegation pointed out that the question of justiciability was not limited to the Women's Convention. It was also relevant to, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, yet in that case, the complaints procedure of article 14 covered the Convention as a whole. In considering it, the importance of the implementation of treaties in good faith and according to the principle of pacta sunt servanda was stressed. Some stated that, while some provisions of the Convention had direct effects and could, as well as should, be implemented immediately, including the non-discrimination provision, other provisions might have to be implemented progressively. The guiding legal principle, however, should be that States parties are under an obligation to take steps towards achieving the goals, an obligation for which they could be held accountable.

Element 6

26. At the recommendation of the Chairperson, no in-depth discussion of element 6 took place, as subsequent elements address the various aspects of a communications (elements 7-16) and of an inquiry (element 17-24) procedure.

27. While some delegations proposed the retention of only the communications procedure, others noted the need for both, a communications and an inquiry procedure.

28. The view was stated that the purpose of the optional protocol would determine whether only one, or both procedures, would be needed. The examination of individual complaints, in an approach similar to other existing individual complaints procedures, was identified by one delegation as the principal purpose of an optional protocol. Only justiciable provisions would fall under the individual complaints procedure, whereas violations of a more general nature of provisions of the Convention could be addressed, for example, in the framework of the reporting procedure.

Element 7

29. With respect to this element, the question of who should have standing to submit a communication was discussed, and whether this should be extended to a person or group having sufficient interest in the matter.

30. A number of delegations were of the view that individuals as well as groups should have standing, along the lines of the Committee on the Elimination of Racial Discrimination, as well as of some regional procedures. Standing for groups would be needed in cases of major violations. The language could be specified to read: "groups or organizations with specific interest in women". It was proposed that "groups" could be more specific, such as "groups of persons", or "groups of individuals", or "groups acting on behalf of individuals". Other delegations referred to the example of the First Optional Protocol under the International Covenant on Civil and Political Rights, which grants standing to individuals only. One delegation stated that only victims themselves should have standing.

31. One delegation, pointing to the quasi-judicial nature of the procedure, did not favour an approach that would allow groups of victims to file complaints. The comparison to national judicial processes was made which also did not allow such group complaints. At the same time, the important role of organizations in assisting victims in filing complaints was stressed. The distinction between the victim having the right to complain, and the person, group, or representative who may file a complaint on the person's behalf, would need to be made clear. In this view, other procedures, such as the communications procedure of the Commission on the Status of Women, were considered to be more appropriate for widespread or systematic violations.

32. Many delegations stated that the term "organization" needed clarification. Any difference to "groups" would need to be elaborated. If "organization" meant "non-governmental organizations", then it should be so stated, in which case it might be merged with "groups". At the same time, a requirement to have groups file on behalf of their members was also proposed. One delegation cautioned against broadening the categories of persons who might submit complaints, as the Committee might be flooded with communications, and noted possible financial implications. On the other hand it was stated that allowing groups to complain could reduce the cost, as the Committee might receive one collective complaint instead of many separate complaints from individuals. Another delegation argued that the inclusion of a third category of "organizations" was called for to address the systematic nature of discrimination and gender-based violence, and would be an innovative element.

33. With regard to the standing criteria of a person or group "having a sufficient interest", many delegations found this to be too vague and broad a formulation. Some delegations found such a provision to be inappropriate. One delegation offered the explanation that this would apply to a situation where the victim herself was not able to complain and a representative would do so on her behalf.

34. One delegation proposed the following categories of standing:

(a) A person acting in her own interest;

(b) An association acting in the interest of its members;

(c) A person acting on behalf of another person who is not in a position to seek relief in her own name;

(d) A person acting as a member, or in the interest, of a group or class of persons;

(e) A person acting in the public interest.

35. One delegation pointed out that the threshold test with regard to the right to complain would depend on the solution of the question of justiciability, and whether all provisions of the Convention would be covered under an optional protocol. Another delegation emphasized that the optional protocol should empower the Committee to deal with complaints regarding any of the Convention's provisions, as was done when the International Convention on the Elimination of All Forms of Racial Discrimination was adopted. It was also pointed out that a compartmentalization of the provisions of the Convention into justiciable and non-justiciable would not be desirable as it might create precedents for other human rights treaties. Some delegations emphasized that the result of the Committee's consideration of a complaint would not be a judgement, but the Committee would assess whether a State party had taken the minimum steps necessary to comply with its obligations under the Convention.

36. One delegation proposed to expand the right to file a communication to include as basis a "threat of violations", or "infringements of rights contained in the Convention".

37. While one delegation proposed to qualify the non-compliance provision by characterizing it as "deliberate, widespread, or systematic", another delegation emphasized that the purpose of the optional protocol would be to establish an individual complaints procedure.

38. One delegation raised the question as to who would bear the cost for proceedings.

Element 8

39. As to whether communications should only be in writing, delegations agreed that, in principle, the procedure should be in writing. Some proposed that in exceptional cases, when the Committee deemed that there was no other reasonable way to lodge a communication, some other means could be accepted, such as oral presentation, or taped submissions. The practical difficulties connected with oral presentations were pointed out.

40. With regard to the confidentiality of the communication, some delegations stressed the need to clarify whether this referred to the identity of the author, the confidential treatment of the communication vis-à-vis third parties, the non-disclosure of the name of the author to the State party, or the outcome of its consideration. It was suggested to clarify the policy objective of this requirement in order to arrive at a solution. The different types of confidentiality requirements contained in various elements, including in 8, 9b, 11, 12, 15 and 24, was pointed out, and the need for clarity and consistency of concepts in each case was stressed.

41. Some delegations understood the provision to mean confidential treatment of the communication, but not that the communication itself should be confidential.

Thus, knowledge of the identity of the author should be limited to the Committee and the State party. This would also be beneficial to the process of mediation. Several delegations emphasized that the State party would need to know the identity of the author in order to reply to the complaint and to initiate remedial action. Other delegations noted that if the aim of the provision was the protection of the author, this could be achieved with the provision contained in element 10, or with some other measure. The need to publicize the facts and findings upon conclusion was stressed.

42. Some delegations spoke in favour of confidentiality along the lines of existing Charter-based procedures, such as the 1503 procedure, or the communications procedure of the Commission on the Status of Women. Others argued that in light of the purpose of the protocol, the principles and practice of other human rights treaty bodies, such as the Human Rights Committee, should be used as models.

Element 9

43. With regard to the admissibility criteria proposed in element 9, one delegation noted that, while the list proposed in the element is reflective of the present stage in other comparable procedures, the preparation of a new protocol offered an opportunity for progressive development and the reflection of current practice.

44. Element 9(b): One delegation expressed support for this formulation.

45. Element 9(c): One delegation sought clarification on the conceptual distinction between "alleged violation" and "alleged failure to give effect". Another delegation noted that the formulation simply reflected a comprehensive view of the provisions of the Convention. Some delegations identified a link between these criteria and the question of standing in element 7, as well as to the question whether all provisions of the Convention would be covered by the protocol.

46. One delegation, supported by another, foresaw a potentially enormous number of communications under the second standard, and proposed the following formulation: "alleged failure to provide effective remedies to situations caused by violations of rights under the Convention".

47. Element 9(d): Several delegations noted that such a criterion is absent from other comparable procedures. They found it to be counter to existing norms and agreed that an optional protocol should apply to acts that had occurred after the entry into force of the optional protocol in the State party. One delegation expressed support for an approach whereby the admissibility criterion would be the entry into force of the Convention, not of the optional protocol, in the State party.

48. Element 9(f): With regard to the element on the exhaustion of domestic remedies, one delegation expressed its preference for the formulation contained in the First Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR). Others stated their preference for language as contained in the Convention against Torture and Other Cruel, Inhuman or

Degrading Treatment or Punishment or the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which stated that the requirement of the exhaustion of domestic remedies should not be the rule where domestic remedies were unreasonably prolonged, or unlikely to bring effective relief. The language contained in the latter would also be in accordance with the practice of the Human Rights Committee, which interpreted its own provision to include the absence of effective domestic remedies, their lack of effectiveness, or denial of a remedy. Another delegation suggested that more general wording might be needed which would include that the victim was unaware of domestic remedies, or of their availability. It was also suggested to include the word "available" before "domestic remedies", as that would be in line with other instruments. One delegation pointed out that it would not be in line with the role of the Committee to judge whether domestic remedies had been exhausted.

49. With regard to the second sentence, and especially the proposed power of the Committee to declare another international procedure "unreasonably prolonged", many delegations agreed that such a provision would be inappropriate as it would give the Committee the power to judge the work of other bodies. Instead, preference for existing language was expressed, such as in the Convention against Torture or in the Migrant Workers Convention, i.e. that the same matter "has not been, and is not being, examined by another treaty body." Reference was also made to article 27.1.b of the European Convention establishing inadmissibility when a petition "is substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information".

50. One delegation, supported by several others, proposed the addition of two criteria, namely that a communication would be inadmissible when manifestly ill-founded; and the inclusion of a time-limit, i.e. that a communication be inadmissible if deposited after 12 months since the date of the decision of the highest domestic instance, or a similar reasonable length.

51. One delegation proposed the addition of the following criteria: "Communications should be in compliance with the principles of objectivity and justice and should include legal remedies or reparations, if any, undertaken by the State party concerned."

52. Element 9(g): One delegation raised the question as to who would determine, and what would be considered, a "reasonable period". It was suggested that the Committee might have this responsibility.

Element 10

53. Several delegations, pointing to the innovative character of this element on interim measures, expressed their support for its explicit inclusion in the optional protocol. They noted that that would be in line with existing practice of international, as well as regional, human rights bodies. In order to avoid irreparable harm, the Committee should be empowered to take urgent action when necessary. Noting the positive intention of the provision, other delegations suggested that it should be left to the Committee to include such a provision in

its rules of procedure. Such a placement would allow the Committee more flexibility in its practical application.

54. A number of delegations, pointing to the language used in the element, considered it inappropriate to confer upon the Committee power to "request" a State party to take such measures. Instead, the Committee should be able to "recommend" interim measures. Their application should be left to the discretion of the State party. The need for a separate undertaking on the part of the State party was doubted, as States parties were already expected to act bona fide upon ratification of the instrument.

55. Several delegations noted a lack of clarity and precision in the use of the term "preservation of the status quo", suggesting that the intention for recommending such interim measures needed to be further specified. They agreed that it could not mean that an alleged violation be preserved, but rather its termination and avoidance of irreparable harm, or the prevention of a violation. One delegation proposed to reword the element to give the Committee the right to recommend, or suggest, interim measures so as not to inflame further the situation. One delegation proposed to distinguish between interim measures at the admissibility stage, and during the proceedings on the merits of a communication, in accordance with the practice of the Convention against Torture.

56. One delegation suggested that there might be a need to monitor the application of such interim measures at the national level.

57. One delegation emphasized the requirement, contained in the element, that no inference could be drawn from the recommendation of interim measures for the Committee's decision on the merits.

Notes

1/ See Official Records of the General Assembly, Fiftieth Session, Supplement No. 36 (A/50/36), chap. I.B.

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Draft report of the Open-ended Working Group (Part II)*

Chairperson: Ms. Aloisia WÖRGETTER (Austria)

57. One delegation emphasized the requirement, contained in the element, that no inference could be drawn from the recommendation of interim measures for the Committee's decision on the merits.

Element 11

58. With regard to the formulation that the State party would be "informed confidentially", several delegations emphasized that, in the light of the purpose of the procedure as individual procedure, the identity of the author would need to be revealed to the State party to enable it to investigate the allegations, remedy the situation, and to provide full information to the Committee to determine admissibility, including the exhaustion of domestic remedies. It was also stated that the State party would be able to implement any recommendations of the Committee only if it knew the identity of the complainant. Only in exceptional cases, when there appeared to be danger for the author, could this requirement be waived or other cautionary measures taken,

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such as interim measures. In that sense, confidentiality in the element would seem to refer to confidentiality vis-à-vis third parties.

59. While some delegations, pointing to a similar provision in the International Convention on the Elimination of All Forms of Racial Discrimination, emphasized the need to obtain the person's consent before revealing her identity to the State party, they agreed that in most cases, the State party would need to know the author's identity to assume its responsibilities. The experience of the above Convention showed that only in one out of seven cases had the identity of the author not been revealed to the State party.

60. While some delegations proposed that it should be left to the Committee to determine, in its rules of procedure, a reasonable time period for the State party to provide replies, other delegations supported the inclusion of a specified period of time. Reference was made to the First Optional Protocol (six months) and the Convention against Racial Discrimination (three months). Several expressed a preference for a six-month time-limit.

61. Several delegations welcomed the proposals for mediation contained in the element. It was, however, stressed that the terms of any settlement would need to be in accordance and compatible with the State party's obligation under the Convention; be acceptable to both parties; and be arrived at without pressure on the author to settle. Those concerns would need to be addressed in relevant provisions of the optional protocol or in the rules of procedure.

62. With regard to the confidential nature of the report on a settlement, some delegations emphasized the importance of a transparent procedure, which would encourage also other States parties to take relevant action, and which would build up the Committee's case law. While the name of the author could be withheld, the results of the settlement should be made public in the report of the Committee, if the author and the State party so wish.

63. One delegation proposed to divide element 11 into two separate elements, whereby the second element would consist of the last sentence.

64. Some delegations pointed out that a State party needed to be informed of the full substance of a communication, and not simply of "the nature of the communication", as suggested in element 12. Thus, it was proposed to state that "the communication as such" be transmitted to the State party. In fact, both parties, i.e. the State party and the complainant, needed to have the full documentation of a case.

65. Some delegations proposed that the State party be represented in meetings of the Committee when matters affecting it were under consideration. One delegation suggested that any means would be acceptable which ascertained the ability of the State party to participate fully and actively. Such a concept could be contained either in the optional protocol, or in the rules of procedure. Other delegations found that it would be inappropriate for the parties to be present at the consideration of a communication. If there were an exception, then it could be only at the specific request of the Committee.

Element 12

66. With regard to a provision that the Committee would examine a communication in the light of information received, inter alia, "from other relevant sources", most delegations emphasized that only information submitted by the author and the State party should be considered. One delegation, in referring to element 7, stated that, as only victims should have the right to submit communications, it would be only the victim and the State party that could provide information on a case.

67. Other delegations pointed out that other relevant sources of information could shed further light on cases where women were disempowered or unable to provide information. Any such information, which could be derived from sources such as reports or deliberations of other United Nations mechanisms, would need to be made available to the parties concerned. Regarding other sources of information one delegation noted that, as communications would be confidential vis-à-vis third parties during consideration, only general background information could be made available to the Committee. Such information might be more usefully provided in the framework of the reporting procedure under article 18 of the Convention.

68. Many delegations agreed that a visit to the territory in the examination of a communication would be inappropriate. One delegation pointed out that such a provision would belong to elements 17-24. Some suggested that, on an exceptional and case-by-case basis, this could be envisaged. There was, however, no need to include such a provision in the optional protocol. One delegation stressed the importance of that aspect, as demonstrated by the successful use of the method under the European system. It was also available in the Inter-American system. It was emphasized that such a visit would only take place with the agreement of the State party. One delegation raised the question of the resource implication of such a provision.

69. With regard to the examination of the communication by the Committee, and in relation to suggestions made by some delegations under element 11 that the State party be present, several delegations emphasized that, in both cases the procedure should be of a written nature and without the presence of the State party. Some delegations stated that, while in principle this should be a written procedure, the Committee should have the power to conduct oral hearings with both parties. The possibility of oral testimony should also not be excluded.

70. One delegation stated that the use of the term "adopt" in this element was inappropriate.

Element 13

71. While some delegations noted that there was no precedent for a provision on the recommendation of remedial measures in cases of non-compliance with treaty provisions in other human rights instruments, they welcomed the addition of the element, especially with regard to reparations. Its inclusion would provide an opportunity, as was the case with certain other elements, for the progressive development and strengthening of international human rights law. Some

delegations noted the consistency of the element with the practice of human rights treaty bodies. The well-established practice of the Committee on the Elimination of Discrimination against Women to adopt recommendations at the conclusion of the consideration of States parties' reports was noted. Reference was also made to General Assembly resolution 41/120, establishing the principle that new international human rights instruments must be consistent with the existing body of international human rights law and may not fall behind existing standards.

72. Some delegations emphasized the importance of the Committee's ability to make recommendations on steps necessary to implement the Convention. At the same time, delegations agreed that the Committee was not a judicial body, and thus its views were of a recommendatory, albeit authoritative, character. The legal responsibility of States parties, resulting from ratification, to remedy violations was emphasized. Some delegations stated that it should be left to the States parties to determine the appropriateness of the remedial measures. Others doubted that the Committee should have the power to recommend remedial measures.

73. Some delegations noted that the intention of the element would be that the State party take the necessary steps to give effect to its obligations under the Convention, i.e. that action be taken by the State party at the national level. Several delegations suggested that the formulation of the element should be drafted in a way to suggest dialogue, rather than judgement.

74. Several delegations identified a lack of clarity in the use of the term "adequate reparation", including clarity as to who would make the determination. Some proposed the deletion of this term. Information on the understanding of the term "reparation" was provided based on a study conducted by an expert of the Subcommission on the Prevention of Discrimination and Protection of Minorities.

75. One delegation proposed the formulation: "... appropriate remedy, including, if need be, adequate reparation". Reference was also made to paragraph 124.d of the Platform for Action for possible language on rehabilitation.

76. Some delegations suggested that the period of time within which a State party would inform the Committee about measures taken should be made specific. A few months was suggested as appropriate.

77. Some delegations pointed out that the question of the justiciability of all provisions of the Convention would have a bearing on the formulation of this provision.

Element 14

78. Several delegations expressed their support for the inclusion of an element on follow-up, and for the intent and formulation of the element. That would be in accordance with the practice of the Human Rights Committee, and the European system.

79. In order to clarify that the element covered the implementation phase of the Committee's views in a case, one delegation, supported by several others, proposed the following formulation: "... concerning implementation of such measures ...".

80. One delegation, in welcoming the element, suggested that element 13 be also cast along similar lines. The need for ongoing dialogue between the Committee and the State party, and the inclusion of relevant information in the framework of reporting, were welcomed by several delegations.

Element 15

81. The Chairperson of the Committee on the Elimination of Discrimination against Women informed the Working Group of an error contained in element 15 to the extent that it should not refer to a "confidential" report. The element should thus read:

> The Committee would, in its report, summarize the nature of communications received, its examination of them, the replies and statements of the States parties concerned and its views and recommendations.

82. Based on this clarification, delegations supported the element. They emphasized the need to publicize the availability of the procedure, the work of the Committee, and to disseminate widely the views of the Committee in order to develop jurisprudence on women's human rights. The inclusion of information about the work under the optional protocol in the Committee's annual report would also be in line with the practice of other treaty bodies, who included in their annual reports a summary of cases after their conclusion and the Committee's findings.

83. Some delegations proposed that, instead of a summary of the nature of the communication, the element should use the formulation of article 14.8 of the International Convention on the Elimination of All Forms of Racial Discrimination, i.e.: "The Committee shall include in its annual report a summary of such communications and, ...".

Element 16

84. Several delegations supported the establishment of a working group of the Committee. This would be in line with the practice of the Human Rights Committee, and would be an effective and efficient method for preparing the work of the Committee as a whole. At the same time, several delegations pointed out that the term "its responsibilities", used in the element, was inappropriate as the Committee would not delegate any authority to the working group. A working group could simply have responsibility for preparing or expediting the handling of communications for the Committee as a whole. They emphasized that only the Committee as a whole could have the power to adopt decisions, including decisions on admissibility of communications. Thus, the following formulation was proposed: "responsibilities for the preparation of consideration of cases ...".

85. Some delegations, noting that the element covered simply a method of work of the Committee, proposed that the provision should be dealt with in the Committee's rules of procedure, instead of in the optional protocol.

86. Some delegations noted the need for further clarification of the nature, function, role and power of a working group of the Committee. The different types and functions of working groups established under human rights treaty bodies, and under Charter-based procedures, were identified.

General points

87. One delegation proposed the addition of an element to cover the Committee's rules of procedure under the optional protocol.

88. One delegation noted that a number of elements proposed for inclusion in the optional protocol reflected the current practice of human rights bodies. Doubts were expressed whether those needed to be included in an optional protocol, or should be left to the Committee to elaborate upon in its rules of procedure. The development of a rigid instrument should be avoided.

Element 17

89. A number of delegations supported the inclusion of an inquiry procedure in an optional protocol as a means of dealing with serious and systematic violations of women's human rights. The existence of a similar procedure under the Convention against Torture, article 20, and at regional levels, was noted. Others expressed doubts about the inquiry procedure proposed in suggestion 7 and suggested that alternatives for achieving the intention behind an inquiry procedure should be explored fully. A number of delegates noted that any new instrument should enjoy the broad acceptance of States parties.

90. Several delegations suggested that possibilities within the Convention on the Elimination of All Forms of Discrimination against Women itself, which would apply to all States parties, should be pursued, such as developing an inquiry procedure under the Committee's existing mandate and rules of procedure. The establishment of an early warning mechanism under the Committee on the Elimination of Racial Discrimination was cited as an example. Introduction of time-bound follow-up to the Committee's concluding comments on States parties reports under article 18 was suggested. Other delegations recommended further study of the possibilities for addressing serious and systematic violations in the framework of reporting under article 18, including follow-up to the Committee's concluding comments, and the request of reports in accordance with article 18.1 (b).

91. Some delegations proposed that element 7 be drafted to enable the Committee to deal with situations of serious and systematic violations under a communications procedure. Universal accession to existing instruments should be promoted. Others emphasized the need to strengthen existing procedures, including the communications procedure of the Commission on the Status of Women and the 1503 procedure.

92. Some delegations raised the question of possible overlapping between an inquiry procedure and existing mechanisms, especially with the communications procedure of the Commission and the 1503 procedure. Others noted the differences in, and complementarity of, these procedures in regard to the proposed inquiry procedure. They expressed concerns about the length of the process under the 1503 procedure, particularly for violations which needed immediate action. The intergovernmental character of the Commission's communications procedure and of the 1503 procedure on the one hand, and of the expert character of the proposed inquiry procedure on the other, were noted. While some noted a general lack of attention under existing procedures to gender-specific violations, others emphasized the need to mainstream women's human rights. Some noted that Charter-based procedures and other treaty-based procedures, were based on different instruments, not on the Convention on the Elimination of All Forms of Discrimination against Women.

93. Regarding the formulation of element 17, several delegations noted that the threshold for admissibility would need to be both serious and systematic violations, i.e. there would be a high threshold to initiate an inquiry. Some noted that an inquiry procedure would enable the Committee to deal with patterns of widespread violations of women's human rights and allow it to address a broader range of issues, including structural causes of violations, than would be the case under the individual procedure. Reliable information would be required to start the procedure. A few delegations expressed concern at the optional nature of many aspects of the proposed inquiry procedure, underlining the need for more active investigation into serious and systematic violations.

94. A number of delegations stated that some provisions of the Convention might lend themselves more to an inquiry procedure than to an individual complaints procedure. A more comprehensive discussion of the merits of the inquiry procedure would thus depend on the development of the communications procedure. Some delegations noted that the "serious and systematic" criteria would need to apply both to alleged violations and to alleged failures to comply. Other delegations found the "failure" category to be redundant and one considered the scope of element 17 to be too broad if it were to be applied to all of the rights covered by the Convention.

Element 18

95. The question was raised as to what mechanisms would be available in case of non-cooperation of a State party.

Element 19

96. The need for including a time-limit was raised.

Element 20

97. Some delegations noted that only the State party concerned would participate in the inquiry, not "States parties". As to the intention of confidentiality in this element, it was suggested that, contrary to the individual communications procedure, those who submitted information leading to

an inquiry procedure would not be involved in its conduct, but that this would be limited to the Committee and the State party.

Element 21

98. Some delegations noted a lack of clarity in the meaning of the term "satisfactory outcome". Some delegations raised the question as to the Committee's attitude in case a State party would not provide the requested information.

Element 22

99. Some delegations raised the question whether the Committee, at the completion of the process, would be empowered to publish its report even without the agreement of the State party. The practice of the Convention against Torture was noted, which consulted the State party, but was not required to obtain agreement from the State party.

Element 23

100. One delegation considered to be redundant the requirement that a State party undertake to assist the Committee, as such cooperation was expected to result from ratification.

Element 24

101. Several delegations emphasized the need to publicize widely the optional protocol, and the following additions, or alternative formulations, were proposed: "... making the provision of the optional protocol widely known in their countries", or "the communication and inquiry procedure should be made public as widely as possible". While the role and participation of United Nations bodies and agencies in such efforts were stressed, some delegations recommended that this should be addressed in a resolution rather than in the optional protocol itself.

Element 26

102. One delegation, referring to a recent amendment to the Convention regarding the Committee's meeting time, suggested that this matter should be left to the Committee to decide in its rules of procedure. Other delegations inquired whether there might be a need for additional annual sessions and sought clarification on the amount of time that might be necessary for the Committee to discharge its duties under an optional protocol. Regarding possible sources of funding for the Committee's work under an optional protocol, it was noted that all treaty bodies were funded from the regular budget of the United Nations.

103. Several delegations noted a lack of clarity regarding the scope of the "expert legal advice", including questions regarding the composition of the Committee. One delegation noted that, upon the adoption of the optional protocol, States parties would need to review such expertise when electing members of the Committee. While the Secretariat would be expected to support

the work of the Committee, the expertise would also need to be in the Committee itself.

Element 27

104. Several delegations suggested that it might be useful to specify the number of ratifications that would be required for the optional protocol to enter into force. While one delegation proposed that it could enter into force after five instruments of ratification had been deposited, other delegations suggested that the intention should be to have as many States parties as possible ratify the optional protocol upon adoption.

Element 28

105. While some delegations proposed that ratifying States parties should be required to accept both procedures covered in an optional protocol, others suggested that, similar to article 28 of the Convention against Torture, States parties should have the opportunity to "opt out" of one of the two procedures. It was also noted that, to the extent that such a possibility was included in an international instrument, it was only with regard to the inquiry procedure. One delegation recommended that, even if the possibility existed, ratification of the optional protocol ought to be without reservations; others stated that reservations might be needed to achieve a large number of ratifications, but that incompatible reservations should not be allowed. It was noted that the First Optional Protocol did not contain a no-reservations clause. Delegations also referred to the discussion on reservations held under element 5.

C. Discussion on justiciability

106. In addition to its consideration during the general exchange of views and of the elements contained in suggestion 7, the Working Group held a further discussion on the question of justiciability. Statements were heard by two members of the Human Rights Committee on this matter, followed by an exchange of views with the Working Group.

107. A number of delegations argued that all provisions of the Convention should be covered by an optional protocol, and that the question of justiciability should not be an obstacle to its preparation. While noting different degrees of specificity in the Convention of rights and of States parties' obligations, i.e. to grant rights, to undertake activities, and to take appropriate measures, they pointed to the legal character of the treaty, which needed to be executed in good faith by States parties. They argued that it should be left to the treaty body to determine in each case, and in a reasonable way, whether a provision was justiciable or not, and whether a State party had fulfilled its treaty obligations.

108. The objective of the Convention, i.e. equality of women and men in the enjoyment of rights and the elimination of discrimination, and the purpose of an optional protocol, i.e. to make the Convention more effective, would make it possible for the supervisory body, on the basis of concrete cases, to determine State party compliance. While noting a State party's margin of discretion in

implementing its obligations and determining measures to be taken, it was also pointed out that a State party's actions in implementing its treaty obligations were subject to meaningful scrutiny by a treaty body. The important role of the optional protocol as a means of recourse for women, and to strengthen enforcement of women's rights, was stressed.

109. Some delegations noted that the classical distinction into civil and political rights as justiciable, and economic, social and cultural rights as non-justiciable could, in the light of practice, case law and academic writings, no longer be maintained. Elements from both could be found in either category. Empowering the Committee to determine justiciability on a case-by-case basis would also enable the further development of case law on the question of justiciability of human rights provisions. It might also stimulate States parties to create effective national remedies and recourse mechanisms for women.

110. While recognizing the potential for difficulties in determining justiciability of some provisions under an individual communications procedure, a number of delegations cautioned against a categorization of treaty provisions into justiciable and non-justiciable. They noted that that would seriously impair the integrity and unity of the Convention and establish a hierarchy of more and less important rights. The right to equality and non-discrimination had in itself been accepted as justiciable by existing human rights mechanisms, including the International Covenant on Civil and Political Rights and Optional Protocol and the International Convention on the Elimination of All Forms of Racial Discrimination. Regional mechanisms, such as the European Convention, the Inter-American Convention, and the African Charter, contained different types of rights, offered individual communications and/or inquiry procedures, but did not distinguish between justiciable and non-justiciable rights.

111. Other delegations expressed their doubts about the inclusion of all the provisions of the Convention under an individual communications procedure. While they agreed that certain rights were quite specific and would thus lend themselves to such complaints, others were of a general nature where the basis for individual recourse would be difficult to determine given the State party's margin of appreciation with regard to measures to be taken. Articles 3, 5 and aspects of 10 were mentioned as examples where difficulties in implementing an individual right to petition would potentially arise. The comparison with the national level, where civil and political rights were justiciable, was made.

112. In that regard, some delegations were of the view that any decision on justiciability should not be left to the Committee on a case-by-case basis, but should be settled among member States. Differences between various legal systems in determining exhaustion of domestic remedies and of standing would also need to be addressed. The question of determining the exhaustion of domestic remedies with regard to programmatic provisions of the Convention was raised, including the assessment of exhaustion of non-judicial remedies. The impact of rights on third parties, i.e. on private individuals, of provisions of the Convention would also need to be addressed.

113. Hesitating to categorize the provisions into justiciable and non-justiciable, one delegation suggested that, instead, the purpose of the optional protocol would need to be further reviewed and its applicability

determined. An admissibility criterion could be the reliable evidence of a consistent pattern of gross violations of the rights guaranteed in the Convention, along the lines of the 1503 procedure. Another delegation suggested that a solution could be sought through the determination of the Committee's mandate, power, and type of recommendations it could pronounce at the end of a communication procedure. In that regard, it was proposed that those would be of a recommendatory, non-binding nature, allowing the State party ultimately to reach a conclusion different from the Committee's. While under the more specific provisions, the Committee's views could be very specific, in others, the process would be more in the form of a dialogue between the Committee and the State party.

114. While some delegations, noting the quasi-judicial nature of an optional protocol, noted the need for legal expertise of the Committee members, others pointed to the composition of the Committee on the Elimination of Racial Discrimination, and possibilities for a more just and fair decision with the participation of non-lawyers.